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No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should *Walton* v. *Arizona* and *Hildwin* v. *Florida*, which held that the Sixth Amendment does not require that eligibility factors in post-*Furman* capital sentencing systems be found by a jury, be overruled?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The defendant in this case asks this Court to declare unconstitutional a practice in use in nine states. It would also require a change in federal capital case indictments, overturning most, if not all, nonfinal federal capital cases. This change is

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

requested on the basis of an interpretation of the Sixth Amendment which this Court has emphatically rejected many times over many years. This disruption of settled practice and trampling upon the people's reliance on this Court's precedents is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant and an accomplice carjacked and robbed a Wells Fargo armored van and murdered the driver. The jury convicted him of first-degree murder, conspiracy to commit armed robbery, armed robbery, burglary, and theft. *State* v. *Ring*, 25 P. 3d 1139, 1142 (Ariz. 2001). The trial judge found two statutory aggravating factors true: pecuniary gain and "especially heinous, cruel or depraved." *Id.*, at 1144. "The judge then determined that the mitigating evidence, when weighed against the aggravating evidence, was insufficient to call for leniency and sentenced Defendant to death for the murder." *Id.*, at 1145. The Arizona Supreme Court rejected the argument that *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) had rendered this procedure unconstitutional under the Sixth Amendment, instead holding that *Walton* v. *Arizona*, 497 U. S. 639 (1990) had not been overruled and was still the controlling precedent. *Ring*, *supra*, at 1152.

SUMMARY OF ARGUMENT

Apprendi's statement that any distinction between elements and sentencing factors was unknown at the time of the Founding is not entirely correct. For some felonies "benefit of clergy" was available, but not for all offenders. Whether a person convicted of a "clergyable felony," such as manslaughter, received the maximum for that offense (death) or a lesser penalty (branding and possibly jail) depended on the facts found in a post-verdict proceeding. Most of the facts were found by the judge. Jury participation was limited to one

specific question. History is consistent with the view that punishment within the statutory range may be determined by facts which are not elements of the crime.

A purely functional definition of "elements" cannot be squared with *Mullaney* v. *Wilbur*, *Patterson* v. *New York*, and *Edwards* v. *United States*. *Patterson* allowed the burden of proof of facts reducing murder to manslaughter to be placed on the defendant while *Mullaney* did not. The key difference was the legislative specification of elements versus affirmative defenses, even though the matters to be proved were functionally equivalent. *Edwards* rejected a Sixth Amendment attack on the practice of the trial judge finding facts which determined the sentence under the Sentencing Guidelines, because the sentence imposed was within the *statutory* maximum for the offense of conviction.

Defendant's argument is contrary to a quarter century of solid precedent. The people of nine states have a massive reliance interest in this precedent. To retry all the cases not yet final on direct appeal would be a massive expenditure and would put the victims' families through another cycle of trial and review. The loss of deterrent effect, recent studies indicate, would cost hundreds and possibly thousands of innocent lives.

For the reasons stated in *Planned Parenthood* v. *Casey*, yet another flip in this intensely divisive area of law would diminish public confidence in this Court.

ARGUMENT

I. Eligibility for benefit of clergy was the common law's closest analogue to "eligibility factors," and it was not an element of the offense.

Apprendi v. *New Jersey*, 530 U. S. 466, 478 (2000) states, "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as

it existed during the years surrounding our Nation's founding." (Footnote omitted). That is not entirely correct. The opinion goes on to say,

> "The defendant's ability to predict *with certainty* the judgment from the face of the felony indictment flowed from the *invariable* linkage of punishment with crime." *Ibid.* (emphasis added). The overstatement of this sentence is revealed by the citation which follows: "See 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon, *or benefit of clergy*, 'the court must pronounce that judgment, which the law hath annexed to the crime' . . .)." *Id.*, at 478-479 (emphasis added, *Apprendi*'s emphasis deleted).

Apprendi thus skipped lightly over a major feature of common law sentencing.

The benefit of clergy began, as the name implies, as an exemption from punishment by secular courts for members of the clergy, as very broadly defined. See 4 Blackstone, Commentaries 358-359 (1st ed. 1769); 1 J. Stephen, History of the Criminal Law of England 459 (1883). Persons so exempted were tried in ecclesiastical courts and punished very lightly. See G. Dalzell, Benefit of Clergy in America 11 (1955). Later, any man who could read was assumed to be a clergyman, a fiction which drifted further from reality as learning spread. 4 Blackstone, at 360. In 1487, by statute, literate laymen were distinguished from actual clergymen, and the former could only claim the benefit once. 1 Stephen, at 462.

Offenders allowed the benefit of clergy were branded on the thumb to more readily identify them on the next offense. *Ibid.* After 1576, they were not turned over to the church, but rather jailed for up to one year. *Ibid.* The privilege was extended to peers without a reading requirement in 1547, and to women in all cases in 1692. *Ibid.* The reading test was routinely faked. See Dalzell, at 24-25. In 1705, it was abolished by statute. See 1 Stephen, at 462. As Blackstone notes, punishing the illiterate more severely than those who had received the benefit of education was backwards. 4 Blackstone, at 363. A further innovation in England was to punish offenders by sending them to America, *id.*, at 363-364, but this enhancement was obviously unavailable to colonial courts.

While the benefit of clergy was being extended to an expanding class of felons, it was also being restricted to a shrinking class of felonies. See 1 Stephen, at 469. The most important of these restrictions was among the first, eliminating the benefit in cases of "murder of malice prepensed." See 1 Stephen, at 464-465 (discussing statutes of 1531 and 1547); Acker & Lanier, Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death, 29 Crim. L. Bull. 291, 293, and n. 8 (1993). This became the distinction between murder and manslaughter. Acker & Lanier, at 294.

Defendant asserts that at common law murder was capital homicide and manslaughter was not, *i.e.*, that "the death penalty was only *available* for" murder. Brief for Petitioner 25. He is mistaken. Manslaughter was a "clergyable felony,"[2] while murder was a "felony without benefit of clergy." Both classes of felony were "death-eligible," to use a modern term, but the latter class meant death in every case, subject only to executive clemency. Repeat offenders could be and were hanged in America for clergyable felonies in the years just before the American Revolution, see Dalzell, at 152, and in some states into the nineteenth century. See *id.*, at 259.

In a nutshell, sentencing for homicide at the time of the American Revolution worked as follows. First, the jury would convict of either murder or manslaughter. "Malice aforethought" was an element of the crime of murder, which distinguished it from manslaughter. As an element, malice

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2. Except that stabbing another to death was not clergyable, even if it was manslaughter rather than murder. 4 Blackstone, at 193. This exception was construed so narrowly as to virtually repeal it. See *ibid.*

aforethought had to be specified in the indictment and proved to the trial jury. See 2 W. Hawkins, Pleas of the Crown, ch. 33, § 25, p. 342 (2d ed. 1726).

If the defendant was convicted of manslaughter, then the trial judge had to determine whether he was eligible for benefit of clergy. This meant determining whether a defendant claiming to be a clergyman really was, see 2 Hawkins, ch. 33, § 113, at 360, whether defendant was eligible as a peer, see Dalzell, at 22, and whether the defendant was ineligible as a repeat offender. See *id.*, at 152.

> "Who is to judge whether a Person who demands the Benefit of the Clergy, has a Right to it or not: I take it, That in all Cases the Temporal Judge is to determine both, whether the Crime be within the Benefit of the Clergy, and also whether the Person who demands it be qualified to demand it or not . . . ." 2 Hawkins, ch. 33, § 113, at 359.

Jury participation in the post-verdict eligibility determination was limited to one specific factual question. If the prosecution alleged a prior crime and prior use of the benefit of clergy, and the defendant denied he was the same person as the one tried in the earlier proceeding, a jury was empaneled "to try the question of identity in issue." 1 J. Chitty, Criminal Law *688 (1819); *State* v. *Carroll*, 24 N. C. 183, 184 (1842). Even so, recidivism was not an element of the offense, as it was not specified in the indictment or determined by the guilt-phase jury, and no question but identity was determined by a jury at all.

At the time of the American Revolution, benefit of clergy was the law in 12 of the 13 states. Dalzell, at 233. The most famous application was in the Boston Massacre case. Two of the British soldiers were convicted of manslaughter, granted benefit of clergy, burned on the hand, and released. See *id.*, at 204. This was accepted practice, even in a case as controversial as this one. *Ibid.*

Benefit of clergy did not survive long after the adoption of the Bill of Rights in most states. Broad penal reforms, including the building of state prisons, soon swept it into the dustbin of history. See *id.*, at 249 (Virginia, 1796); *id.*, at 252 (Maryland, 1810); *id.*, at 254 (New York, 1788); *id.*, at 255 (Massachusetts, 1785); *id.*, at 267 (Georgia, 1817). Even so, it was a part of the common law heritage and was a law in effect in most states at the time the Sixth Amendment was adopted.[3] A Sixth Amendment argument based on the law as it existed in 1791, see *Apprendi*, 530 U. S., at 478-480, necessarily fails if the rule asserted would have been inconsistent with the practice of benefit of clergy.

Certainly it is not true that every fact that went into the determination of punishment was an element of the offense. The fact that determined whether a homicide was clergyable manslaughter or nonclergyable murder was an element, but the facts that determined whether the manslaughter convict actually received the benefit were not. Common law practice was consistent with the distinction between elements and sentencing factors expressed in Justice Scalia's dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 257, n. 2 (1998), quoted *infra*, at 17.

First-degree murder under Ariz. Rev. Stat. § 13-1105(C) is analytically similar to a "clergyable felony" in 1791. It is punishable by death or a lesser punishment, with the choice to be made in post-verdict proceedings. Those proceedings are not entirely discretionary but involve some fact-finding. While the law *may* assign some of the fact-finding to a jury, as the common law did with disputed identity in prior conviction cases, that does not make the fact an element of the offense or bring it within the Sixth Amendment. These sentencing factors

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3. In 1791, it had been abolished in Massachusetts and New York, as noted above, and it had never been the law in Connecticut. See *id.*, at 257.

may be found by judges, so long as the maximum punishment is within the range established for the offense.

II. Defendant's purely functional definition of elements cannot be squared with *Mullaney*, *Patterson*, and *Edwards*.

A. Rejection of the Purely Functional Definition.

Defendant argues for a purely functional definition of elements of the offense for constitutional purposes. See Brief for Petitioner 10. Under this view, it would be completely irrelevant how the legislature defines the elements of the offense or what it specifies as the maximum punishment for the base offense. Instead, courts would look only at what facts lead to what punishment and apply the constitutional protections of burden of proof, jury trial, and, in federal cases, indictment to the facts needed for the punishment. This purely functional approach cannot be reconciled with *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), *Patterson* v. *New York*, 432 U. S. 197 (1977), and *Edwards* v. *United States*, 523 U. S. 511 (1998).

Mullaney arose in a state with the traditional definitions of murder and manslaughter. "Malice aforethought" was the element of murder which distinguished it from manslaughter, but it was defined in the negative, as the absence of "heat of passion on sudden provocation." 421 U. S., at 686-687; see also *id.*, at 701-702 (discussing "proving a negative"). In these circumstances, placing the burden of proof on the defendant violated the Due Process Clause. See *id.*, at 703-704.

The other bookend of this pair is *Patterson* v. *New York*. The New York law at issue in that case did not make "malice" an element of second-degree murder, but instead required only intentional killing. 432 U. S., at 198. In place of the common law "malice" element, New York provided an affirmative defense of "extreme emotional disturbance," which would reduce the crime to manslaughter if proved by the defendant by

a preponderance of the evidence. *Id.*, at 199-200. The Court upheld this system, rejecting the argument that *Mullaney* controlled. See *id.*, at 214-216.

Mullaney and *Patterson* cannot be reconciled with a purely functional analysis. In both Maine and New York, the state could rest after proving only intentional killing. In both states, the defendant could not reduce the murder to manslaughter by raising only a reasonable doubt as to the existence of heat of passion or extreme emotional distress; instead, he had to affirmatively prove it. Yet one system was constitutional and the other was not.

The difference, says *Patterson*, was that in Maine malice "was part of the definition of [the] crime" of murder. *Id.*, at 216. The legislative definition of the elements does matter. Once the legislature declares an element, it cannot presume the element and shift the burden of proof, even though, within limits, it can *functionally* accomplish the same result by redefining the crime and its associated affirmative defenses.

Patterson noted that "there are obviously constitutional limits beyond which the States may not go" in changing elements into affirmative defenses. *Id.*, at 210. While the existence of those limits may be obvious, the extent of them is not. Since *Patterson*, the Court has not needed to define the limits because the legislatures have not pushed them. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Harris* v. *United States*, No. 00-10666, p. 19; Hoffman, *Apprendi v. New Jersey*: Back to the Future?, 38 Am. Crim. L. Rev. 255, 272 (2001).

Patterson held that the legislature may, within limits, redefine a degree-fixing element as an affirmative defense and place the burden of proof on the defendant. If so, there would seem to be no logical reason why it cannot, within limits, set a range of punishments for a single offense and structure the choice within that range based on facts to be determined at sentencing. That is, in essence, what the Sentencing Guidelines

do, and this Court rejected a constitutional attack on them just four years ago.

In *Edwards* v. *United States*, 523 U. S. 511, 512-513 (1998), the defendants were convicted of a cocaine conspiracy. The sentences were within the statutory range for any kind of cocaine. See *id.*, at 515. However, the sentence determination under the Guidelines required the judge, not the jury, to determine that the defendant's "illegal conduct had involved *both* cocaine *and* crack." *Id.*, at 513 (emphasis in original).

Under a purely functional analysis of the type proposed by defendant, the maximum legal sentence in *Edwards* would have been the *Guidelines* maximum based on the facts found by the jury verdict, which did not specify crack as opposed to powder. See *id.*, at 513; cf. Brief for Petitioner 10. Functionally, the defendants in *Edwards* could not be sentenced to more than the Guidelines provide for powder without a finding that crack was involved, and this finding, under defendant's theory, would have to be made by the jury and not the judge. Yet the *Edwards* Court unanimously rejected the Sixth Amendment argument, noting that the actual sentence did not "exceed[ ] the maximum that the *statutes* permit for cocaine-only conspiracy." 523 U. S., at 515 (emphasis added). *Apprendi* reaffirmed this holding. *Apprendi* v. *New Jersey*, 530 U. S. 466, 497, n. 21 (2000).

B. An Ameliorative Innovation.

Patterson noted that the ability of the legislature to redefine elements as defenses was not unlimited, and that drastic restructuring to evade the basic burden of proof requirement would be unconstitutional. See 432 U. S., at 210. Citing this portion of *Patterson*, *Apprendi* noted that a similar constraint could apply in the event of a hypothetical "extensive revision of the State's entire criminal code . . . ." 530 U. S., at 491, n. 16. The situation with capital punishment and "eligibility" factors is the antithesis of this hypothetical.

By requiring the finding of an aggravating factor to narrow the class of defendants eligible for capital punishment, Congress and the state legislatures have not removed constitutional protections from elements that traditionally had those protections. Instead, they created an entirely new requirement purely for the benefit of the defendant, compared to what the law was before. See *Dobbert* v. *Florida*, 432 U. S. 282, 294-295 (1977) (post-*Furman* changes "ameliorative"). Degrees of murder were invented in 1794 to narrow the eligible class, see *McGautha* v. *California*, 402 U. S. 183, 198 (1971), but no further narrowing occurred through 1971. See *id.*, at 199. The American Law Institute had proposed "aggravating circumstances" in substantially their present form in 1959, see *id.*, at 202, 223-224, but no state voluntarily adopted them. See *id.*, at 203. After *Furman* v. *Georgia*, 408 U. S. 238 (1972), they were widely adopted to meet the constitutional narrowing requirement. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994).

As an innovation in the law which operates purely in favor of the defendant relative to the traditional definition, death-eligibility sentencing factors are well within the constitutional limits indicated by *Patterson* and *Apprendi*. See *Patterson*, 432 U. S., at 207 (noting the new defense was "a substantially expanded version of the older heat-of-passion concept"). Under these decisions, legislatures have the power to define the elements of crimes and the range of punishments for them. Affirmative defenses and sentencing factors which reduce the offense or punishment or structure the sentencing decision with the statutory range are also within the legislative power. There is no danger that states will take advantage to remove from the jury the elements that traditionally defined first-degree murder and recharacterize them as "aggravating factors." It has been 26 years since *Proffitt*, with no movement in that direction yet. The principal legislative innovation since then has been to add new categorical exclusions, usually with the burden of proof on the defendant. See Cal. Penal Code § 190.5(a) (under 18, burden on defendant); Tr. of Oral Arg. in *Atkins* v. *Virginia*,

No. 00-8452, p. 13 (retardation, burden on defendant in every state). Ameliorative innovations may be stifled if a brickload of burdens automatically attaches to them. See *Patterson*, 432 U. S., at 207-208.

Apprendi is squarely premised on the consistency of its rule with all precedents except, possibly, *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). The *Apprendi* Court says a contrary ruling would have been a "rejection of the otherwise *uniform* course of decision during the *entire* history of our jurisprudence." 530 U. S., at 490 (emphasis added). To accept defendant's expansive interpretation of the *Apprendi* rule would require repudiation of *Apprendi*'s premise. Not only does he ask for overruling of *Walton* v. *Arizona*, 497 U. S. 639 (1990), as well as *Spaziano* v. *Florida*, 468 U. S. 447 (1984) and *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*), see Brief for Petitioner 23, n. 16, defendant's interpretation of *Apprendi* is also inconsistent with a pair of well-established precedents that have been part of the fabric of the law for a quarter century and with a unanimous decision that predates *Apprendi* by only two years. Nor does it end there, as we will show in part IV, *infra*. Such an interpretation cannot be correct.

III. Drawing the line between aggravating and mitigating facts would have the reform-inhibiting effect foreseen in *Patterson*.

In *Apprendi* v. *New Jersey*, 530 U. S. 466, 501 (2000) (concurring opinion), Justice Thomas suggested a constitutional distinction between facts that increase punishment and facts that mitigate punishment. Drawing the line in this manner would distinguish *Patterson* v. *New York*, 432 U. S. 197 (1977) on its facts, but it would be inconsistent with the reasoning of that decision, as discussed in part II, *supra*. In addition, it would have the effect of inhibiting reforms, as *Patterson* warned against. See *supra*, at 11-12.

The traditional felony murder rule was that a participant in a robbery in which a person was killed was guilty of murder, even though he neither committed nor intended the killing, and 20 states even permitted the death penalty in such cases in post-*Furman* statutes. See *Enmund* v. *Florida*, 458 U. S. 782, 820 (1982) (O'Connor, J., dissenting). Under *Enmund* and *Tison* v. *Arizona*, 481 U. S. 137, 138 (1987), states may still impose the death penalty on a nontriggerman who intends to kill or acts with reckless disregard of human life.

Many would consider it a salutary reform to narrow the definition to exclude all persons lacking intent to kill. However, the state may be unwilling to shoulder the burden of proof. See *Patterson*, 432 U. S., at 207. The perpetrators of the felony are frequently the only living witnesses to the murder. Indeed, the victims are often killed precisely for the purpose of preventing their testimony. As one notorious criminal explained his cold-blooded murder of two teenage boys, " 'I couldn't have no punks running around that could do that [identify him], so I wasted them.' " *People* v. *Harris*, 28 Cal. 3d 935, 945, 623 P. 2d 240, 245 (1981).

California dropped its felony-murder special circumstance down to the *Tison* minimum precisely because of the difficulty of proof in the multiple perpetrators situation. See Cal. Penal Code § 190.2(d).[4] A partial affirmative defense of lack of intent would be far easier to enact if the burden of proof could be placed on the defendant. Yet under a straight aggravating/mitigating definition of "elements," intent to kill would surely be aggravating, and burden-shifting would be impermissible.

The *Patterson* Court had it right the first time. It is better to leave the specification of the elements of crimes to the legislative branch and permit innovation, so long as wholesale evasions are not attempted. See also *Schad* v. *Arizona*, 501

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4. The author of Proposition 115, which added this subdivision to § 190.2, so informed counsel for *amicus* at the time of the campaign.

U. S. 624, 639 (1991) (plurality opinion); *Montana* v. *Egelhoff*, 518 U. S. 37, 58 (1996) (Ginsburg, J., concurring in the judgment).

IV. To overturn a quarter century of consistent precedent despite massive reliance would be a monumental betrayal of public confidence in this Court.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 844 (1992). Yet 26 years after this Court held that jury sentencing is not constitutionally required, while reviewing a system where the sentencing included the finding of at least one aggravating circumstance, see *Proffitt* v. *Florida*, 428 U. S. 242, 250, 252 (1976) (lead opinion), that holding is still questioned. Cf. *Casey*, *supra*, at 844. It is astonishing that this question can even be seriously asked, given the duration, number, and consistency of precedents, but there is no doubt of the proper answer. The precedents should be emphatically reaffirmed.

A. The Precedents.

In 1976, this Court considered together five post-*Furman* capital sentencing systems. The pertinent case for present purposes is *Proffitt*, *supra*. The holdings of *Proffitt* are found in the joint opinion of Justices Stewart, Powell, and Stevens under the "narrowest grounds" rule. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). The *Proffitt* Court fully understood that, given the jury override feature of Florida law, "[t]he sentencing authority in Florida [is] the trial judge . . . ." 428 U. S., at 251. The *Proffitt* Court further understood that the trial judge had to make the finding of an aggravating circumstance. See *id.*, at 250. As the plurality noted later in *Barclay* v. *Florida*, 463 U. S. 939, 954 (1983), this passage of *Proffitt* means that "the Florida statute . . . requires the sentencer [*i.e.*, the judge] to find at least one valid aggravating circumstance

before the death penalty may even be considered . . . ." The *Barclay* concurring opinion agreed, stating, "the *trial judge* must make three separate determinations in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt . . . ." *Id.*, at 961 (Stevens, J., concurring) (emphasis added). With this unmistakable understanding of what the sentencing phase in Florida required, *Proffitt* held that it was constitutionally permissible for this function to be performed by the judge rather than the jury. 428 U. S., at 252.

If *Proffitt* itself were not clear enough, the Court expressly addressed a Sixth Amendment challenge in *Spaziano* v. *Florida*, 468 U. S. 447, 458 (1984). This was a year after the further clarification of the Florida system in *Barclay*, *supra*. Spaziano's jury returned only a general recommendation of life imprisonment by majority vote, see *id.*, at 451, meaning that there was no jury finding of any aggravating circumstance. With the awareness that sentencing included the finding of an aggravating circumstance, the Court rejected the claim that the Sixth Amendment required it be done by a jury. See *id.*, at 459. The Court further noted it had already upheld the Florida system twice and then upheld it a third time. *Id.*, at 464-465.

Hildwin v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) addressed the precise issue before the Court in the present case in unmistakable terms. "This case presents us *once again* with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that *permit* the imposition of capital punishment in Florida." *Id.*, at 638 (emphasis added). The question could not be stated more clearly. The answer is no. *Id.*, at 640-641. *Hildwin* further noted that this holding was necessarily included in the holding of *Spaziano*. See *id.*, at 640.

The *Hildwin* opinion was joined by seven Justices, including Justice Stevens, author of the *Spaziano* dissent. Justices Brennan and Marshall expressed no disagreement with the holding of the Court, but stated only their standard continuing refusal to abide by a landmark precedent, see *id.*, at 641

(Brennan, J., dissenting), and with the summary disposition. *Ibid.* (Marshall, J., dissenting). The question presented today was regarded 13 years ago as so well settled as to be appropriate for summary affirmance, *i.e.*, "the judgment below is thought to be so obviously correct and the conflicting decision so clearly wrong that the Court feels further consideration is unnecessary . . . ." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 256 (7th ed. 1993).[5] The conflicting and clearly wrong decision was *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1027 (CA9 1988), cert. denied sub. nom *Lewis* v. *Adamson*, 497 U. S. 1031 (1990) (Rehnquist, C. J., and White and Scalia, JJ., dissenting, O'Connor and Kennedy, JJ., not participating).

This well-settled state of the law was resoundingly reaffirmed the next year. Rejecting a Sixth Amendment argument, *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990) stated, "Any argument that the Constitution requires that a jury impose the sentence of death *or make the findings prerequisite* to imposition of such a sentence has been *soundly rejected* by prior decisions of this Court." (Emphasis added). Thus, an appellate court could affirm a death sentence despite a vague definition of an aggravating circumstance by finding itself that the circumstance was true under the proper definition. See *id.*, at 751.[6]

By the time this Court addressed the present question in an Arizona case, there was not much left to say. The Florida cases were on point and controlling. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990). Walton's claim that aggravating

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5. Stern, et al. proceed to discuss several other reasons why summary affirmance might be appropriate, none of which applies to *Hildwin*. See *id.*, at 256-257.

6. Aggravating circumstances serve the same function in Mississippi as they do in Florida, *i.e.* at least one must be found for eligibility and then they are "weighed" against the mitigating. See *Stringer* v. *Black*, 503 U. S. 222, 229 (1992); *id.*, at 234 (same as Florida).

circumstances are "elements" in Arizona and not in Florida was squarely rejected. *Id.*, at 648.

The opinion of the Arizona Supreme Court in the present case, on which the defendant places such reliance, see Brief for Petitioner 17-18, tells us nothing the Court has not long known. *Of course* the finding of an aggravating circumstance is a prerequisite to the imposition of a death sentence. See *State* v. *Ring*, 25 P. 3d 1139, 1152 (Ariz. 2001). That has been fully understood from the beginning to be true in Arizona, see *Arizona* v. *Rumsey*, 467 U. S. 203, 206 (1984), as well as Florida, see *supra*, at 14, Mississippi, California, see *Pulley* v. *Harris*, 465 U. S. 37, 51 (1984), and every other jurisdiction that has chosen to narrow its death penalty with aggravating (or "special") circumstances instead of defining a higher degree of murder. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (noting two acceptable ways of narrowing); *id.*, at 244 (noting most states have gone the "aggravating circumstances" route). The correctness of Justice O'Connor's description of the Arizona system in *Apprendi* v. *New Jersey*, 530 U. S. 466, 538 (2000) (dissenting opinion), is not in doubt, so the Arizona Supreme Court's confirmation does not change anything. What is in doubt is her interpretation of the majority opinion as saying "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Ibid.* The opinion of the Court in *Apprendi* does not say that. The relevant passage, *id.*, at 497, quotes Justice Scalia's dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 257, n. 2 (1998). That footnote says,

> "What the cited cases [*Walton*, *Hildwin*, and *Spaziano*] hold is that once a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed—*even where that decision is constrained by a statutory requirement that certain*

'aggravating factors' must exist." (Last emphasis added, other emphases in original).

Apprendi thus distinguished *Walton* on exactly the basis that the state distinguishes this case from *Apprendi*. If *Walton* was not controlling in *Apprendi*, as *Apprendi* itself flatly states, 530 U. S., at 496, then *Apprendi* cannot be controlling precedent in a case indistinguishable from *Walton*.

If a ≠ b and a = c then b ≠ c.

B. Reliance.

One of the most important considerations in deciding whether to overrule a precedent is the extent of reliance on the existing rule. See *Casey*, 505 U. S., at 855-856. It is sometimes said that the reliance interest is not strong in cases involving procedural rules, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), but that is not universally true. Certainly, criminal defendants have very little reliance interest in rules which favor them, because of their unique privilege against appeal under the Double Jeopardy Clause. A defendant who successfully relies on a favorable procedural rule is acquitted, or, in the penalty phase, escapes the death penalty, and that judgment can never be reversed, no matter how patently erroneous it may later be seen to be. See *Rumsey*, 467 U. S., at 212.

Quite the opposite is true for the prosecution. Under *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) *every* new constitutional rule applies fully retroactively to *every* judgment not yet final on direct appeal, regardless of how faithfully the trial court followed then-controlling precedent at the time of trial. Even a practice defendant did not object to may be reversed as "plain error," even if it was plainly correct under the law existing at the time of trial. See *Johnson* v. *United States*, 520 U. S. 461, 468 (1997).

After *Furman* v. *Georgia*, 408 U. S. 238 (1972) the states had to change their laws and guess what procedures would pass constitutional muster. Those that guessed wrong had to change

them again after *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976). Still further changes were required by *Lockett* v. *Ohio*,438 U. S. 586, 604 (1978) (plurality opinion). Other new rules have not required legislation, but they have invalidated practices used in nearly every case in a state and previously considered perfectly acceptable. See, *e.g.*, *Mills* v. *Maryland*, 486 U. S. 367, 395 (1988) (Rehnquist, C. J., dissenting).

A new rule overturning a statewide practice is a disaster. In terms of dollars alone, the cost of trying and reviewing a capital case is much larger than a run-of-the-mill felony. Part of that cost is necessary, and part is generated by the unnecessarily complex and constantly changing law of capital sentencing. See G. Kanner, Hurdles Erected by Death Penalty Foes Haunt Underpaid Capital Case Counsel, L. A. Daily Journal, April 13, 1992, p. 6. But there are other costs that, although less tangible, are even more important.

When capital cases are overturned, the prosecution must choose between the financial and human expense of putting families and witnesses through another cycle of trial and review or, alternatively, letting a murderer among the most brutal get off with an inadequate, unjust sentence. Even if they decide to go forward, the staleness of the case may result in a life sentence where death was truly warranted.

That is not all. A major reason for capital punishment is deterrence. The existence of a deterrent effect has always been debated, but a flurry of recent studies confirm what common sense has long told us: the death penalty will have some deterrent effect if it is actually enforced. See Cloninger & Marchesini, Execution and deterrence: a quasi-controlled group experiment, 33 Applied Econ. 569 (2001); Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data, Emory University Working Paper 01-01 (January 2001), <http://userwww.service.emory.edu/~cozden/Dezhbakhsh_01_01_paper.pdf>; Mocan & Gittings, Pardons, Executions and Homicide, NBER Working Paper No. w8639 (December 2001),

<http://www.nber.org/papers/w8639>. For a less sophisticated but more easily understood study, see Tucker, Capital Punishment Works, The Weekly Standard at page 27 (Aug. 13, 2001).

The Cloninger and Marchesini article is particularly revealing for its indication of the impact of legal turmoil affecting all cases in a state. *Ex parte Davis*, 947 S. W. 2d 216 (Tex. Crim. App. 1996) created a de facto moratorium in Texas lasting about a year. 33 Applied Econ., at 569-570. The authors estimate that the lost deterrent effect killed over 200 people. See *id.*, at 575.

Turmoil in this important area of the law has a high cost in dollars, but it has an even higher cost beyond monetary measure. If the change being proposed were necessary to correct some monstrous evil, it might be debatable whether the cost was justified. Underlying *Furman* was the well-founded fear that the death penalty was being administered discriminatorily against black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-481 (1993) (Thomas, J., concurring). No such issue is presented here. *Proffitt* v. *Florida*, 428 U. S., at 252, long ago rejected the claim that judge sentencing would be more arbitrary. The State of Nebraska, a state with judge sentencing, recently commissioned a study and, surprisingly, named the well-known anti-death-penalty partisan Dr. David Baldus[7] to lead it. Even so, the study concluded, "There is no significant evidence of the disparate treatment of defendants based on the race of the defendant or the race of the victim." D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999); A Legal and Empirical Analysis; Executive Summary 14 (2001), <http://www.nol.org/home/crimecom/homicide/execsum.pdf> (capitalization normalized). Change would also be warranted to prevent the execution of

7. See *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984), aff'd in part, 753 F. 2d 877 (CA11 1985), aff'd, 481 U. S. 279 (1987) (noting "partisan bias" of the witnesses, including Baldus).

innocent people, but the change proposed here has nothing whatever to do with the accuracy of the guilt determination.[8]

Twenty-six years ago, this Court reviewed a system where the trial judge made the finding of the death-eligibility circumstance, with a jury that was merely advisory and gave its advice by a simple majority vote. If there were a Sixth Amendment problem with that system, it would have been obvious at the time. If this Court had said so, Florida and the other court-sentencing states could have changed their laws then. Instead, they relied on this Court's repeated and unambiguous holdings to the contrary. The State of Colorado relied on these holdings to switch to court sentencing. See Colo. Stat. § 16-11-103(2)(a) (three-judge panel finds aggravating circumstances).

Congress itself relied on the holding that eligibility circumstances are not "elements" when it enacted the federal death penalty law in 1994. Although it provided for a unanimous jury finding beyond a reasonable doubt as a matter of policy, see 18 U. S. C. § 3593(c), (d), it did not require the factors to be specified in the indictment. See 18 U. S. C. § 3593(a) (notice by the government). If these factors were elements, this would be unconstitutional. See *Almendarez-Torres*, 523 U. S., at 228; *United States* v. *Allen*, 247 F. 3d 741, 763-764 (CA8 2001), cert. pending, No. 01-7310 (rejecting *Apprendi*/Indictment Clause attack on federal death penalty, citing *Walton*).

If defendant's argument is accepted, it means a new sentencing trial for *every* capital case not yet final in Arizona,

8. It is worth noting at this point that the common claim that nearly 100 former death-row inmates have been released after being "proven innocent" is bogus. The list includes such people as Jeremy Sheets, who was released because the principal witness against him is dead, see *State* v. *Sheets*, 260 Neb. 325, 332-333, 352, 618 N. W. 2d 117, 125, 137 (2000), and Jerry Bigelow, whose jury inexplicably acquitted him of murder despite finding true every element of the crime. See *Bigelow* v. *Superior Court*, 208 Cal. App. 3d 1127, 1129, 256 Cal. Rptr. 528, 529-530 (1989). These cases illustrate the extreme lengths our system goes to *favor* the defendant.

Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska and a new indictment, trial, and sentencing for *every* such case in the federal system. It means a huge cost in dollars wasted, years wasted, justice long delayed and probably denied, and the likely loss of innocent lives through diminished deterrence. And all for what? To correct a supposed "defect" in current procedure so far removed from fundamental fairness that it was not perceived in a quarter century of the most intense and demanding scrutiny that any legal procedure has ever been subjected to in the history of law. The benefit from this change, if any, does not remotely approach the cost.

C. Public Confidence.

In *Casey*, 505 U. S., at 861, the Court noted that in cases involving major national controversies there are additional reasons to adhere to precedent. Capital punishment is such a controversy, and the reasons discussed in *Casey* apply with full force.

1. Frequent overruling.

"There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith . . . . The legitimacy of the Court would fade with the frequency of its vacillation." *Id.*, at 866. For capital punishment, unlike abortion, this concern is not hypothetical. Cf. *ibid.* That point is at hand.

For over three decades now, the American people have trudged the switchback trail of capital punishment jurisprudence. In their quest for a real, enforced death penalty for the very worst murderers, they have been led first one direction, then the opposite, based on conflicting signals of what the Constitution is supposed to require.

Witherspoon v. *Illinois*, 391 U. S. 510 (1968) disapproved a widespread practice in jury selection which had been expressly approved by this Court in *Logan* v. *United States*, 144 U. S. 263, 298 (1892). See *Witherspoon*, *supra*, at 536-537 (Black, J., dissenting). This decision brought executions to a halt as states went about retrying cases tried in reliance on long-established precedent. The majority opinion mentioned *Logan* only in a footnote and inexplicably referred to the clear holding of that case as "dictum." *Id.*, at 523, n. 22.

The next major battle was discretionary sentencing. In *McGautha* v. *California*, 402 U. S. 183, 196 (1971), the Court addressed the claim "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable." Justice Harlan, writing for the majority, traced the history of capital punishment and discretionary sentencing, *id.*, at 197-206, before reaching the conclusion. "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution." *Id.*, at 207 (emphasis added).

The sentencing method that had been perfectly valid in May of 1971 suddenly became unconstitutional 13 months later. *Furman* v. *Georgia*, 408 U. S. 238 (1972). For the second time in four years the existing sentences, tried in a manner this Court had expressly said was constitutional, were wiped out. Again, the people had to pick up the pieces and start over.

The process of starting over was infinitely complicated by the inability or unwillingness of the Justices in the *Furman* majority to agree on a single opinion. Legislatures across America were told that vitally important statutes were unconstitutional but not told why or how to fix them. They had to guess.

The National Association of Attorneys General formed a committee to try to cope with *Furman*. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 447, 556 P. 2d 1101, 1117 (1976) (Clark, J., concurring in the judgment). The consensus

of the nation's top prosecutors was that mandatory sentencing was needed to comply with *Furman* and that the states which had enacted "guided discretion" statutes were on shaky ground. *Ibid.*, 556 P. 2d, at 1117-1118.

This view was not limited to prosecutors. In 1976, the discretionary systems were attacked for being discretionary. See *Gregg* v. *Georgia*, 428 U. S. 153, 199 (1976) (lead opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 254 (1976) (lead opinion); *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (lead opinion). The mandatory systems were attacked for being only "ostensibly" mandatory while actually "invit[ing] the exercise of sentencing discretion." Brief for Petitioners in *Woodson* v. *North Carolina*, O. T. 1975, No. 75-5491, pp. 18-19; Brief for Petitioner in *Roberts* v. *Louisiana*, O. T. 1975, No. 75-5844, p. 19 ("*de facto* sentencing discretion").

The "better" view turned out to be a wrong guess. Mandatory sentences were banned in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). In justifying this result, the *Woodson* lead opinion relied on *McGautha*, the very precedent so unceremoniously dumped in *Furman*. *Id.*, at 297. The lead opinion also relied on Chief Justice Burger's *dissent* in *Furman*, *ibid.*, and it noted without apology that the statutes it was striking down were enacted in an effort to comply with *Furman*. *Id.*, at 298.

Sweeping up the broken glass once again, the states endeavored to comply with what the Constitution "required" in 1976, as opposed to what it had "required" in 1972 or 1971. Unfortunately, cases tried in 1976 would later be reviewed to determine if they complied with what the Constitution would "require" in 1987.

Proffitt rejected the main attack on Florida's system, that it was unconstitutional "because it *allows* discretion to be exercised at each stage of a criminal proceeding . . . ." 428 U. S., at 254 (lead opinion) (emphasis added). *Proffitt* then went on to review the essential features of the Florida system and approve the system so described.

The Florida statute specified the mitigating factors. *Id.*, at 249, n. 6. There was no catch-all factor.

> "On their face these procedures . . . appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against *seven* mitigating factors to determine whether the death penalty shall be imposed." *Id.*, at 251 (emphasis added).

If that were not clear enough, the *Proffitt* Court modified its quotation of the Florida statute to insert "statutory" before "mitigating." *Id.*, at 250. Thus, the *Proffitt* Court understood the Florida system to weigh on the mitigating side a specified list of enumerated factors. If the lack of a "catch-all" factor was a constitutional defect, it was apparent on the face of the statute. Yet *Proffitt* did not see it as a defect. The Constitution did not require consideration of circumstances beyond the statutory list on July 2, 1976.

Twenty-nine days later, James Hitchcock strangled and murdered 13-year-old Cynthia Driggers. Hitchcock had molested her, and he killed her when she said she would tell. *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987). He was tried for that crime under the eminently reasonable belief that Florida law limited mitigating circumstances to the statutory list and that *Proffitt* had upheld that system.[9]

Lockett v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) declared, out of the blue, a constitutional mandate to consider whatever factors the defendant may offer in mitigation. In an attempt to distinguish *Proffitt*, the plurality observed that *Proffitt* had noted that while the statute did not include a catch-all factor, it also did not expressly preclude nonstatutory mitigation as opposed to nonstatutory aggravation, which was

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9. The actual state of Florida law at that point was somewhat ambiguous, see *id.*, at 396-397, but that is not material to the point under discussion here. Hitchcock's trial judge understood the law to be as *Proffitt* understood it.

precluded. This, said *Lockett*, showed that *Proffitt* understood Florida to allow nonstatutory mitigation, ignoring the clear, contrary language in the body of the opinion, noted above. *Id.*, at 606, n. 15. The transparency of this evasion did not escape the Justices dissenting from *Lockett*'s new rule. *Id.*, at 629-630 (Rehnquist, J., dissenting); *id.*, at 623-624 (White, J., concurring in the judgment).

Eleven years after the crime, James Hitchcock's sentence was overturned because his trial judge committed the "error" of taking *Proffitt* at its word. Cynthia Driggers, dead at 13, would have been 24 by then. This Court cannot undo the damage done in the past by its repeated disapproval of previously approved practices. It can, however, refrain from causing such damage again.

"There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term." *Casey*, 505 U. S., at 866. Large segments of the American public have already justifiably concluded that the incessant disapproval of previously approved practices is the product of simple hostility to capital punishment rather than genuine application of principles really in the Constitution. The last thing the Court, the country, or the rule of law needs is yet another wholesale uprooting.

2. Intensely divisive controversy.

Furman v. *Georgia*, *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and the *Gregg* companion cases, taken together, represent one of the resolutions of an "intensely divisive controversy" of the sort discussed in *Casey*, 505 U. S., at 866. Those cases resolved that capital punishment could not continue in America as it had been, but that it would not be abolished by the judiciary. The cases further sketched the outline of what was allowable. Many subsidiary rules have

sprouted since then, a few of which we have discussed, but defendant in this case asks for something qualitatively different.

Defendant asks that a major structural feature of one of the systems approved in *Proffitt*, adopted in many states, and expressly upheld multiple times now be disapproved. The Court should not disapprove major features of the approved systems any more then it should go back and authorize the mandatory or unguided discretionary systems it previously disapproved. The broad outlines of *Gregg* and the companion cases represent a great compromise which neither side likes, but which has created at least a workable set of rules. Those who struggle to implement those rules are betrayed when the rules are suddenly changed. See *Casey*, *supra*, at 868. It would take an extraordinarily compelling need to justify such a betrayal, and no such need is present in this case.

"Finally, this Court has previously considered and rejected the argument that the principles guiding [*Apprendi*] render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 530 U. S., at 496. Nothing has changed. That argument should be rejected again.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

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Respectfully submitted,

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